LIBRARY
SUPREME COURT. U. S.

FILED
DEC 28 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 856

WILLIAM P. KENNEY,
Petitioner,

v.

CALIFORNIA TANKER COMPANY, a Delaware corporation,
Respondent.

BRIEF IN REPLY TO PETITION FOR A WRIT OF CERTIORARI.

RODNEY M. LAYTON,
DAVID T. DANA, III,
RICHARDS, LAYTON & FINGER,
4072 Du Pont Building,
Wilmington, Delaware,
Attorneys for Respondent.

December 26, 1967.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

TABLE OF CONTENTS.

	Page
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
QUESTIONS PRESENTED	4
ARGUMENT	5
I. The United States Supreme Court Should Not Grant Certiorari on a Petition Reciting Only That Both Trial and Appellate Courts Below Stated the Wrong Reasons for Reaching the Right Decision	5
II. Certiorari to Review a Discretionary Judgment Should Be Denied	6
CONCLUSION	8

TABLE OF CASES.

	Page
Boudreau v. U. S., 250 F. 2d 209 (9th Cir., 1957)	5
Edmond v. Moore-McCormack Lines, Inc., 253 F. 2d 143 (2d Cir.), cert. den. 358 U. S. 843, 79 S. Ct. 73, 3 L. Ed. 2d 82 (1958)	6
Helvering v. Gowran, 302 U. S. 238, 58 S. Ct. 154, 82 L. Ed. 224 (1937)	6
Layne and Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923)	7
Link v. Wabash R. Co., 370 U. S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734, 6 F. R. Serv. 2d 41(d).11, Case 1 (1962), reh. den. 371 U.S. 873, 83 S. Ct. 115, 9 L. Ed. 2d 112	5, 6, 7, 8
The Sabine v. The Richmond, 103 U. S. 540, — S. Ct. —, 26 L. Ed. 313 (1880), reh. den. 103 U. S. 542, — S. Ct. —, 26 L. Ed. 450	7
United States v. Rimer, 220 U. S. 547, 31 S. Ct. 596, 55 L. Ed. 578 (1911)	7

AUTHORITIES CITED.

	Page
5 Am. Jur. 2d 170, Appeal and Error § 727	6
2 C. J. S. 324, Admiralty § 190	7
36 C. J. S. 671, Federal Courts § 204(21)	6
Moore's Federal Practice, ¶ 41.11[2] (2d ed. 1964)	6

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, dated July 28, 1967, is reported at 381 F. 2d 775.

STATEMENT OF THE CASE.

In this brief, references abbreviated (PA) are to pages of Petitioner's Appendix.

Petitioner seeks the United States Supreme Court's review of the Third Circuit Court of Appeals' ruling which affirmed the District Court for the District of Delaware's *sua sponte* dismissal of his action for failure to prosecute.

The Petitioner, a seaman, began this suit on October 29, 1962, by filing a Libel in Admiralty with 13 numbered interrogatories attached. Respondent answered both the libel and the interrogatories on January 16, 1963. Then, for more than 20 months, no action of any kind was taken in the case.

On October 9, 1964, the District Court first ordered Petitioner to show cause why his action should not be dismissed for failure to prosecute. The impending dismissal prompted the Petitioner to assert that Respondent's answer to Interrogatory No. 13 was inadequate and to request certain admissions of fact. Respondent promptly responded to these discovery procedures by informing Petitioner's counsel that no further answer was required to Interrogatory No. 13 and by responding to the Admissions of Fact on November 13, 1964, well within the stipulated time for response. The Court did not dismiss the action at this time but gave Petitioner a chance to pursue his discovery.

Two years passed. On November 1, 1966, for the second time, the District Court ordered the Petitioner to show cause why the case should not be dismissed for failure to prosecute. On November 10, 1966, the full history and status of the case was discussed before the Court. Peti-

tioner had an opportunity to explain his inaction, but the case was in the same status that it had been for two years. The District Court ruled that the case be dismissed for failure to prosecute, and on November 16, 1966, the District Court's orders dismissing the action and denying Petitioner's motion for reargument were entered.

QUESTIONS PRESENTED.

I. SHOULD CERTIORARI BE DENIED WHERE THE REASON FOR SEEKING REVIEW IS ONLY THAT THE COURT BELOW STATED THE WRONG REASONS FOR REACHING ITS RESULT?

II. SHOULD CERTIORARI FOR REVIEW OF A CIRCUIT COURT'S AFFIRMATION OF A DISCRETIONARY JUDGMENT BE DENIED?

ARGUMENT.

I. The United States Supreme Court Should Not Grant Certiorari on a Petition Reciting Only That Both Trial and Appellate Courts Below Stated the Wrong Reasons for Reaching the Right Decision.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. (U. S. Sup. Ct. Rule No. 19), The District Court for the District of Delaware and the Third Circuit Court of Appeals each fully heard argument on the issues presented by this petition for writ of certiorari. The issues now presented for a third hearing are simply whether the District Court has power to dismiss a case for failure to prosecute; and if so, whether that power has been abused under the circumstances of this case.

Petitioner's suit was dismissed for his failure to prosecute it. Petitioner seeks certiorari because the two courts below stated they dismissed the case pursuant to a rule of court rather than stating that it was done under the court's inherent power (PA 13-15).

It is beyond question that Federal courts have power to dismiss actions *sua sponte* for failure to prosecute. *Link v. Wabash R. Co.*, 370 U. S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734, 6 F. R. Serv. 2d 41(d) 11, Case 1 (1962), rehearing denied 371 U. S. 873, 83 S. Ct. 115, 9 L. Ed. 2d 112. Admiralty cases provide no exception to this inherent power. *Boudreau v. U. S.*, 250 F. 2d 209 (9th Cir., 1957). Petitioner has not demonstrated any Federal question of substance, nor has he demonstrated that the Circuit Court has rendered a decision in conflict with the decision of an-

other Court of Appeals on the same matter (U. S. Sup. Ct. Rule No. 19).

All Petitioner has urged is that the Circuit Court and the District Court stated the wrong reason for their decision. Assuming, but not conceding, that the reason stated for the decision was wrong, this is no "special and important" reason justifying a review on writ of certiorari. Generally, an appellate court is concerned with the holding of the court below, not the reasoning of its opinion. 5 Am. Jur. 2d 170, Appeal and Error § 727; See, *Helvering v. Gowran,* 302 U. S. 238, 58 S. Ct. 154, 82 L. Ed. 224 (1937).

Petitioner's argument that certiorari should be granted because the District Court dismissed the action under a rule of court promulgated pursuant to the court's inherent power—rather than having dismissed it pursuant to the inherent power itself—is without merit.

II. Certiorari to Review a Discretionary Judgment Should Be Denied.

"Special and important" reasons for grant of certiorari do not exist when the matter to be reviewed lies within the discretion of the trial judge.

The decision whether to dismiss an action for failure to prosecute is purely discretionary with the trial judge. *Link v. Wabash R. Co., supra; Moore's Federal Practice,* ¶ 41.11[2] (2d ed. 1964). That Petitioner is a seaman does not change the discretionary nature of the District Court's decision. See: *Edmond v. Moore-McCormack Lines, Inc.,* 253 F. 2d 143 (2d Cir.), cert. den. 358 U. S. 843, 79 S. Ct. 73, 3 L. Ed. 2d 82 (1958).

The United States Supreme Court will not ordinarily disturb a discretionary action of the court below, where that action has a reasonable basis. 36 C. J. S. 671, Federal Courts § 204(21). In admiralty cases it has been held that

there is a presumption of the correctness of the trial judge when the intermediate appellate court has approved of his action. 2 C. J. S. 324, Admiralty § 190; *The Sabine v. The Richmond*, 103 U. S. 540, — S. Ct. —, 26 L. Ed. 313 (1880), reh. den. 103 U. S. 542, — S. Ct. —, 26 L. Ed. 450

In the present case Petitioner has shown no conflict in interpretation of the *Link v. Wabash* holding that the Federal courts have the inherent power to dismiss actions *sua sponte* for failure to prosecute. The decision presented for review is nothing more than an ordinary discretionary judgment that, in fairness, the Petitioner's dilatory prosecution required a dismissal. Certiorari has been dismissed as improperly granted when, on examination, the court finds an ordinary case without issues of "far-reaching importance", or where there is no asserted conflict between two Circuit Court cases. See: *United States v. Rimer*, 220 U. S. 547, 31 S. Ct. 596, 55 L. Ed. 578 (1911); *Layne and Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923).

Petitioner simply has not presented the considerations governing review on certiorari. This is an ordinary case with no "special and important" reasons. The Court of Appeals has rendered no decision in conflict with the decision of any other court of appeal, no important question of Federal law is presented, no Federal question has been decided in conflict with applicable decisions of the United States Supreme Court.

The District Court's discretionary judgment is not presented as so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of supervision. For almost four years Petitioner failed to prosecute his case. On two occasions he was reminded by the court that his case could be dismissed for failure to prose-

cute. The District Court has a responsibility to secure just, speedy, and inexpensive determination of every action. The court has surely acted pursuant to this responsibility in giving the Petitioner two chances, two years apart, to either prosecute his case or explain why it has not been prosecuted. The entire history of the case heralds Petitioner's dilatory prosecution. It is no abuse of discretion to have dismissed this case for failure to prosecute. Surely, it was a decision well within the guide lines provided by the local District Court Rule No. 12 (PA 6) cited with approval by the U. S. Supreme Court in *Link v. Wabash, supra.*

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari be denied for the reason that no special and important reasons therefor have been shown.

Respectfully submitted,

RODNEY M. LAYTON,

DAVID T. DANA, III,

RICHARDS, LAYTON & FINGER,
Attorneys for Respondent.